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MAR 3 1955
HAROLD B. WILLEY, Cler

No. 636

IN THE

Supreme Court of the United States

JOHN C. BRUSWITZ and EDWARD C. KOENKE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 22, 1955.

Opinions Below

The District Court rendered no opinion. A majority opinion and a concurring opinion, not yet reported, were rendered by the United States Court of Appeals for the Second Circuit and are printed in the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 22, 1955 (R. p. 2471). A

timely petition for rehearing filed on January 21, 1955 (R. p. 2473) was denied on February 2, 1955 (R. p. 2478). The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1254(1).

Questions Presented

The principal questions raised, not necessarily in the order of their importance, are as follows:

1. During the trial it became apparent that the Government relied, in part, on obviously false testimony. Therefore, the case poses fundamental problems concerning standards of fairness in federal criminal prosecutions.

(a) May the judge, under the circumstances described above, remain passive and even refuse to inspect the exhibits which conclusively established the falsity of the testimony?

(b) Is the prosecutor under some obligation to investigate the nature of the evidence on which he seeks a conviction, when it becomes apparent that it is spurious?

(c) May the prosecutor resort to trickery plainly designed to hoodwink and deceive the jury about the spurious evidence?

(d) May the judge, on the last trial day, refuse an overnight adjournment to enable the defense to cope with the prosecutor's tactics, thus leaving the deception unexposed?

2. The prosecution for the third year, 1951, was based on the theory that certain commissions which had been received by corporations owned by the petitioners had been omitted from petitioners' personal income tax returns for that year. This attribution of corporate income to the peti-

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tioners was made despite the fact that the corporations had all the usual attributes of separate identity, including the fact that the alleged personal income was kept in the corporations' bank accounts and never reached the petitioners. Moreover, there was no contention and no showing that the treatment as corporate income caused any detriment to the revenue.

This aspect of the case raises, broadly speaking, two questions:

(a) What constitutes sufficient evidence of income tax evasion based on the disregard of the corporate entity?

(b) What are appropriate instructions to the jury?

Since this is the first criminal case in which a Court of Appeals has held that the corporate entity was properly disregarded, both questions raise a host of novel and important problems which are discussed below. Perhaps the most significant problem is whether there can be tax evasion without detriment to the revenue and what effect should be given to corporate tax payments.

3. Since on the very question of the corporate transactions the Government's erroneous theory of the case was permitted to come before the jury as evidence, the question is raised: Is it within the discretion of the trial judge to permit a Government agent to volunteer wholly erroneous opinions on tax law, embodying the Government's fallacious theory of the case and falsely accusing petitioners of crimes outside the indictment? Moreover, may the trial judge permit the agent to quote hearsay statements of his superiors to the same effect?

4. The alleged unreported income for all the years involved consisted of secret commissions which legally be-

longed to petitioners' employer. There was specific testimony negating a "claim of right" to the sums received. Under these circumstances, can a conviction stand, if the question whether there was a "claim of right" and no restriction on use, was not submitted to the jury?

5. Several rulings at the trial similarly raise questions of considerable importance in tax prosecutions. Among them are:

(a) In a prosecution in which the receipt of commissions is undisputed, but unethical and illegal, was evidence of attempts to receive additional commissions properly received—evidence which was obviously irrelevant but designed to inflame the jury?

(b) May the trial judge in commenting on the facts in a prolonged and complex case stress in his charge only those inferences which point to petitioners' guilt?

The Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be * * * deprived of life, liberty or property without due process of law.

The statutes involved provide as follows:

Title 26, United States Code

Sec. 145. Penalties

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.—Any person required under

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this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 18, United States Code

Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of the Case

Two separate indictments (each in three counts) charged each petitioner, respectively, with income tax evasion for the years 1949, 1950, and 1951, in violation of 26 U. S. C. §145(b); a third indictment charged both with conspiring to commit the substantive offenses, in violation of 18 U. S. C. §371.

The indictments were consolidated and the trial proceeded before Hon. Edward Weinfeld, United States District Judge and a jury in the United States District Court for the Southern District of New York. That Court had juris-

diction of the cause by virtue of 18 United States Code §3231. The petitioners were found guilty on all counts.

The petitioners were minor employees of subsidiaries of Bethlehem Steel, in charge of transportation over water. While they themselves did not determine the allocation of Bethlehem business among contractors bidding for it (S. M. 2102-3), their expert knowledge of transportation matters enabled them to give valuable advice on tariffs and cargo transportation generally (S. M. 1003-6, 1009, 1292-3). In return, several contractors secretly paid them commissions on business with Bethlehem Steel. The payments are sometimes loosely referred to as commercial bribes. It is questionable whether the term is apt since they were made for collateral services. In any case, the opinion below is correct in holding that they belonged to the employer under state law.

Three firms, during the first two years, paid commissions in cash to the petitioners (S. M. 1542-4, 1547, 1915, 1916). The receipt of the commissions and their omission from petitioners' tax returns for those years was not disputed, but the circumstances under which the payments were made, particularly as they affected petitioners' intent, were vigorously disputed. The witnesses for the Government and the petitioners agreed that it was essential to keep the arrangement secret (S. M. 975, 670, 1559, 1925). Petitioners contended that they were induced to omit the amounts in question from their income tax returns by the payors who told them that they, in turn, would not take tax deductions for the payments, thus keeping the Government whole (S. M. 1556).

For the third year, the largest payor balked at not taking tax deductions for payments to the petitioners (S. M. 915). Consequently, to preserve the secrecy of the arrangement and yet enable the payor to deduct the payments, at

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the payor's suggestion, petitioners organized a corporation which employed them. The corporation had the same relation as the petitioners had had before, with this payor and one other firm except that tax deductions for the commissions paid were openly taken by those firms. A firm that had discontinued dealing with the petitioners as individuals, made an entirely new arrangement with the corporation (S. M. 352-4) and one firm that had never dealt with petitioners as individuals paid commissions to the corporation (S. M. 1330-1).

Actually, the exigencies of petitioners' business forced them ultimately to organize three more corporations. But for all practical purposes this can be considered as if only one corporation were involved.

The petitioners contended that their willingness to subject the commissions to double taxation as corporate income in the third year was a strong indication that only secrecy and not fraud on the revenue were the objects of the arrangement in the earlier years.

In this context an alleged cash payment in 1951 was a hotly disputed question of fact. Interrelated with the cash payment and bearing on the *bona fides* of the separateness of the corporations was an issue concerning the place where invoices of petitioners' corporations had been prepared.

As they become pertinent, additional facts are supplied below in the course of the discussion of reasons relied on for allowing the writ.

Reasons Relied on for Allowing the Writ

I.

The trial was not conducted in accordance with the elementary standards of fairness which should prevail in federal criminal prosecutions and there is a conflict among Circuits whether it was conducted in accordance with "due process" requirements.

Bouchard, the owner of one of the firms that paid commissions to Steveco, petitioners' corporation, testified that invoices (Exhs. 32-38) which purported to be invoices of Steveco, had actually been prepared in his office (S. M. 650). His bookkeeper testified to the same effect (S. M. 518-522).

Apart from calling in question the *bona fides* of the corporate set-up, this testimony bore directly on one of the most hotly contested issues in the case, namely, whether Bouchard had made a cash payment to the petitioners in 1951. This issue was significant, first, because it was otherwise undisputed that all commissions had been received by and accounted for by the corporations, and, second, because the judge instructed the jury that if it found that the cash payment had been made, it need not consider the corporate transactions at all in order to arrive at a verdict of guilty (S. M. 2308).

The opinion below intimates that if the prosecutor could be shown to have used the testimony, knowing its falsity, reversal would be required (App. 7a).

In the course of the examination of Bouchard and his bookkeeper, the petitioners asked for, and put in evidence, specimens of the typewriting (Exhs. U, V, W) of the only three typewriters which, according to the testimony of the Government witnesses, could have typed the questioned documents (S. M. 516-17).

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It was plain to the naked eye that the type on the questioned documents was wholly dissimilar from that of the specimens;* hence Bouchard's story could not possibly be true. But despite the physical evidence, Bouchard and his bookkeeper persisted in it (S. M. 532).

What is obvious, however, is not necessarily so to a jury of laymen who are considering a long and complex case with a bewildering array of exhibits and figures. Consequently, petitioners asked the trial judge to inspect the pertinent exhibits and to appoint his own expert (petitioners suggested an expert on questioned documents from the Federal Bureau of Investigation) to resolve the matter (S. M. 525-6).

The prosecutor urged that the defense be left to its own devices (S. M. 527, 529). The trial judge, in the best tradition of the sporting theory of justice, refused to look at the exhibits and to take cognizance of the matter. He also refused to appoint an impartial expert (S. M. 526-7).

Many trial days elapsed during which the prosecutor might have, and for all we know may have, sifted his proof with the help of the Federal Bureau of Investigation and that of all the other resources at the command of the Government. The petitioners, at the end of their own case, produced as conclusive refutation of the Government's case, a well qualified expert (S. M. 2074-6) who testified that the Bouchard typewriters could not have produced the questioned documents (S. M. 2077).

Cornered, the prosecutor fell back on stratagem. He insinuated on cross examination that an overhaul of one of the typewriters might have changed the typefaces (S. M. 2082-3), although there was no evidence whatever that the typefaces had ever been changed.

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* For the convenience of the Court, one of the questioned documents and the three specimens are reproduced in the Appendix. Observation of the numerals 5, 6, 7, 8 and 9 shows the complete dissimilarity of the typewriters (Cf. S. M. 2078-2080).

This happened late in the afternoon on the last day of the trial which had lasted for about four weeks. Petitioners requested an adjournment overnight so that they might subpoena earlier typing samples to counter the insinuation (S. M. 2090).

The adjournment was refused (S. M. 2091) and petitioners were forced to begin summations in a night session which followed an intermission for dinner (S. M. 2115, 2121). As far as can be ascertained, there is no precedent for such a night session, at least in the Southern District of New York.

(1) The Court of Appeals found no error in the foregoing, because, in its view, petitioners had failed to show that the prosecutor knew that the testimony was false. In so holding the Second Circuit is in conflict with the Sixth Circuit, the only other circuit which has passed on a similar question. In *Jones* v. *Commonwealth of Kentucky,* 6 Cir., 97 F. 2d 335, that Circuit held that false testimony coupled with a denial of a reasonable adjournment to meet it, constitutes a denial of due process, despite the prosecutor's good faith in proffering the false testimony.

(2) However, a more fundamental question is raised. The *Jones* case and the cases on which the Court of Appeals relies are all collateral challenges of judgments which had become final. These cases are concerned only with the question whether the prior proceedings were void because due process had not been accorded to the challengers. The Court of Appeals tacitly assumes that the scope of review on direct appeal from a conviction is no broader and that due process is the sole test of whether a conviction should stand.

It is submitted that a direct appeal also calls in question the maintenance of proper standards for the enforcement of the federal criminal law in the federal courts. *McNabb* v. *United States,* 318 U. S. 332, 341. Surely, such standards

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are not met, if a trial judge refuses to take cognizance of a palpable fraud perpetrated under his nose and in the end, by a capricious and unprecedented ruling, prevents the graphic exposure of that fraud.

Further, the actual ignorance of the prosecutor of the spurious character of the testimony is difficult to reconcile with the explicit notice he had, and his subsequent deceptive tactics. But granting, *arguendo,* ignorance on his part, is he under no duty whatever to sift evidence and to take the most elementary precautions that no miscarriage of justice occur? Does he not at least have to abstain from hoodwinking the jury?

It is no answer that in this case an astute jury could readily have detected the falsity of the evidence. If a jury of laymen is supposed to possess that degree of astuteness then surely the learned prosecutor was not ignorant of what he was doing. This Court has recently suggested (in a more limited context) that the Government does owe to an accused some obligation to investigate. *Holland* v. *United States,* 97 L. Ed. (Advance pp. 127, 137). As this Court put it:

> "It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

The issue tendered has recently been widely discussed in connection with other cases. The Attorney General, in a commendable public statement, expressed views concerning the duty of the Department of Justice to sift evidence used to convict, which accord wholly with petitioners' contentions (New York Times, Feb. 18, 1955). It is submitted, however, that it would take the intervention of this Court to insure that this elementary obligation of civilized government is discharged in actual practice.

II.

In connection with the corporate transactions there was no evidence of tax fraud as a matter of law and in any case the instructions concerning the disregard of the corporate entity were erroneous.

The opinion below leaves the legal problems which the corporate transactions raise in the obscurity of unstated facts. These facts are briefly supplied below, and it will readily become apparent that more has happened here than the routine application of well understood doctrine.

It was undisputed that petitioners rendered to the payors a variety of valuable services for which they received commissions from firms which did business with their employer. In most cases the commission was measured by the payors' business with the employer.

In the third year, to permit payors to account properly for the commissions paid, petitioners organized corporations which rendered services through them, as employees. One of the avowed purposes was to use the anonymity of a corporation to hide the payments from petitioners' employer (S. M. 1567).

In two instances the corporations continued existing arrangements under which the petitioners, individually, had received commissions. In two others, entirely new agreements were made (S. M. 352-4,1330-1). According to the Government's own proof, the only time the question came up specifically, petitioners made it crystal clear that payment to the corporations was to be made only for future and not for past services (S. M. 1135-6).

It was further entirely undisputed that the corporations kept separate bank accounts, maintained accurate books which reflected every penny of income as well as the

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source from which it was received, employed independent accountants and lawyers, maintained offices, filed income tax returns when due, paid taxes, and otherwise kept their affairs wholly separate. Petitioners received reasonable salaries which they, in turn, reported as income.

No contention has been advanced that the Government stood to receive less revenue through the corporations than if the petitioners had treated the commissions received as individual income. In this respect the Government contented itself with showing that income, alleged to be attributable to petitioners, was missing from their returns, without regard to the corporate tax situation.

(1) The Court of Appeals, *sub silentio,* overruled petitioners' contention that detriment to the revenue (or at least attempted detriment) is one of the elements of the crime of tax evasion; in other words, that a scheme must tend to diminish the revenue in order to constitute a crime. Heretofore the Government seems never to have attempted a prosecution in which that element was not obviously present. As a consequence, the point has never been passed on squarely.

A clue to what prompted the departure from a policy* to which the Government had consistently adhered is found in the testimony of a Government agent. It seems the reason for attributing the corporate income to petitioners is not to be found in the cases on which the Court of Appeals relies. In the Government's view, the corporations served an illegal purpose, hence they were "dummies" whose income is to be attributed to petitioners and whose ordinary and necessary expenses are to be disallowed.

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* This Court has noted this policy with evident approval in *Rutkin* v. *United States,* 343 U. S. 130, footnote p. 133.

This view of the matter was reflected to some extent in the charge to the jury which also has no relation to the authorities on which the Court of Appeals relies. The charge is discussed below. Here, we limit ourselves to the observation that heretofore it was assumed that persons who wish to conceal their activities, legal or otherwise, could carry on business in corporate form without converting minor misdemeanors under state law into federal felonies—at least as long as the revenue was not diminished.

(2) Passing the lack of evidence of detriment to the revenue, we find further that this element was specifically removed from the jury's consideration as we show below in our discussion of the charge, concerning the corporate transactions. For the convenience of this Court the pertinent portion of the charge is reprinted below:

> "Now, the fact that the stock was owned by the defendants does not mean that the payments to the corporations may be considered as income to them. Quite the contrary. Under ordinary circumstances, the conduct of a corporation's affairs, its financial transactions, and its income are treated entirely separate from and independent of its stockholders. Usually only the dividends declared upon the stock owned by the shareholders represent income to them.
>
> "It is, of course, perfectly legitimate to carry on business activities by means of corporations. The fact that persons elect to carry on activities in corporate form, and cause their shares of stock to be issued in the name of a nominee rather than in the name of the true owners, does not in and of itself give rise to an inference that they intend to evade payment of income tax.

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"But here the government contends that the four corporations were organized to continue, and carry out the prior arrangements, under which in the years 1949 and 1950 cash had been paid to the defendants; that the corporations were used exclusively for the purpose of receiving the payments on behalf of Koenke and Bruswitz when those who had made the cash payments in prior years refused to continue to make them in that fashion.

"If you find beyond a reasonable doubt that the corporations were organized and created solely and only as conduits for the receipt of moneys payable to the defendants in continuation of their prior arrangements with Bouchard, Jarka and Sheridan, and were intended as a subterfuge or a cover-up to conceal the payments to them as individuals, then you may treat the moneys paid to the corporations as income to the individual defendants.

"This is without regard as to whether or not the corporation paid the taxes on such income as it may have declared. In other words, if you find that the corporations had no real business relationship with those making the payments, and Steveco, Lakecan, Inland and Coastwise rendered no services, sold no commodities and gave no consideration of any kind to the payors, and that such corporations were simply dummy or paper organizations for the sole purpose of receiving moneys for the defendants in continuation of their prior arrangements, then the moneys paid to the corporations against the various invoices submitted by Bruswitz and Koenke from time to time may be considered as income to the defendants and should have been included in their individual returns.

"If, on the other hand, you find that the corporations in fact received the payments for a proper business transaction, or that they were not created, and did not serve the sole purpose of receiving funds for the defendants, then the moneys so paid to the corporations in the year 1951 may not be treated as income to the individual defendants.

"You may ask yourselves: Were the four corporations organized to serve as conduits to receive moneys for the defendants under their respective prior arrangements and in continuation thereof? In other words, were they merely means of banking the cash for the individual defendants, to be withdrawn thereafter by them as and how they pleased? Or did the defendants keep the affairs of the several corporations which they caused to be formed and in which they owned stock, separate and apart from their personal affairs? Were the corporations treated as separate entities, and did they function as such?" (S. M. 2308-11)

(a) Petitioners' exceptions to this portion of the charge were much broader (S. M. 2357-2360) than the opinion below suggests. Even in civil situations the question whether the corporate entity should be disregarded has led to much controversy in this Court. Cf. *Moline Properties, Inc.* v. *Commissioner,* 319 U. S. 436; and *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422. This Court has never decided what the test may be for criminal purposes. The cases on which the Court of Appeals relies are civil cases dealing with income assignments and sham sales to wholly owned corporations. The Third Circuit, in the only remotely similar case which has arisen (*Nicola* v. *United States,* 72 F. 2d 780), holds that the Government must prove that income was assigned after it was earned. If

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this is the test and if the evidence had warranted it, simple instructions such as those suggested in the *Nicola* case could have been given. The instructions as given, however, ignore this test in favor of suggesting circumstances under which the corporate entity may be disregarded.

(b) The first two paragraphs of the quoted portion of the charge summarize circumstances under which no "inference of tax fraud" arises. By contrast, the succeeding paragraphs obviously summarize circumstances under which such an inference does arise. Hence, when the judge used the phrase, "This is without regard as to whether or not the corporation paid the taxes on such income as it may have declared," he eliminated this element entirely from the case and in effect said that the inference of tax fraud arises independent of it.

(c) Careful reading of the portion of the charge dealing with intent (S. M. 2320-2330) makes it plain that the corporate tax payments were not submitted to the jury to be considered in that connection. But even if they were, it was plain error to require the jury to determine whether the corporations were separate entities without considering the payment of corporate taxes. Surely, this is one aspect of consistent treatment as separate entity, and as such at least entitled to be weighed together with all other facts.

(d) In addition, the charge let the determination of guilt or innocence depend on factors which were, to say the least, misleading.

Thus, the fact that the corporations "were organized to continue and carry out prior arrangements, under which in the years 1949 and 1950 cash had been paid to the defendants" can hardly prove guilt. Surely, a personal service business can incorporate and thereafter render the

same services which had been rendered individually before. A holding to the contrary would seem to be in conflict with *Paxson* v. *Commissioner,* 3 Cir., 144 F. 2d 772.

The fact that the corporations were intended as "a cover up to conceal the payments to the defendants" can hardly indicate guilt. Concealment from petitioners' employer was the avowed purpose of doing business in corporate form.

The corollary of treating the desire to conceal as one of the stigmata of guilt is found in the passage of the charge which follows and deals with factors indicating innocence. The jury was told that it might infer that the payments were corporate income if they were in fact received from "proper" business transactions. However, the business of the corporations by definition was not "proper."

In effect, the trial judge accepted to some extent the Government's novel contention that an entity engaged in illegal business activities is to be disregarded for tax purposes.

(e) The Second Circuit, after some preliminary difficulty, had finally evolved a test as to when the corporate entity may be disregarded for (at least civil) tax purposes. The definition of a "sham" corporation as announced in *National Investors Corp.* v. *Hoey,* 2 Cir., 144 F. 2d 466, 468, is a corporation that serves no purpose except to avoid taxation. It will be readily observed that the charge does not apply this test.

(3) In discussing the insufficiency of the evidence we are somewhat handicapped by the vagueness of the standard to apply. Obviously, the evidence did not show the assignment of earned income because in at least two

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instances the arrangements with the corporations were not even continuations of prior arrangements (S. M. 352-4, 1330-1). Equally obviously the corporations were not a mere "sham," because they were not "avoiding" taxes; on the contrary, they made the income subject to double taxation. Moreover, they had at least one other purpose, namely, concealment.

Measured against the charge itself, there was certainly no evidence to warrant the characterization of the corporations as conduits, for none of their funds ever reached the petitioners, except as duly reported reasonable salaries. Nor could the jury find that the corporate transactions were mere continuations of the personal transactions for in at least two instances they were entirely new arrangements. Moreover, it was clear that the corporations did render services, albeit, through the petitioners, their employees.

(4) It would seem that the indiscriminate disregard of the corporate entity in criminal tax cases introduces an element of criminal risk in all transactions involving closely held corporations. It constitutes an important problem of federal law which ought to be settled by this Court. We do not discuss in detail why reversal of the third counts would require reversal of the entire case here. On this score we limit ourselves to the observation that one of the judges (Judge Frank, perhaps anticipating action by this Court) in a concurring opinion (App. 8a) expressly reserved this question.

III.

In permitting hearsay and erroneous opinion evidence concerning tax law, the trial judge disregarded fundamental rules of evidence; and the Second Circuit in sanctioning this is in conflict with other Circuits.

The manner in which the Government's contention was brought before the jury, itself constitutes a rather startling innovation in the law of evidence, which is bound to confuse bench and bar alike until this Court speaks.

A Government agent who had examined the corporate books, on cross examination admitted that they accurately reflected receipts and disbursements (S. M. 1491-2). Defense counsel next sought to establish that thorough investigation by the Government had not revealed that corporate funds had been used for personal expenditures. To this end the following took place (S. M. 1492):

> "Q. And did they purport to have been expenditures for corporate purposes? Did they so purport? A. We maintained that they were not ordinary and necesary expenses.
>
> "Mr. Schachner: Might I ask that this be stricken, what the contention of the Government is?
>
> "The Court: I will allow it. Motion denied."

The answer was, of course, not responsive and plainly an inadmissible opinion which should have been stricken. Since the trial court failed to strike it, the defense attempted to show that it was the product of mere inadvertence. For this purpose the payment of accounting fees was singled out and following ensued (S. M. 1493):

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"Q. Well, is the payment of an accounting fee an ordinary and necessary expense? A. Based upon numerous conferences I had with my supervisors and various other members of my office, we reached a decision that the four corporations formed by Mr. Bruswitz and Mr. Koenke were dummy corporations, serving an illegal purpose; therefore, the expenses by these corporations were not considered ordinary and necessary business expenses, and under the law, could not be deductible.

"Mr. Schachner: I ask that the answer of the witness be stricken in toto as being very highly prejudicial, absolutely wrong under the law, and certainly what he confers about with his superiors, is no evidence whatsoever here; also, as being entirely contrary to any law, and the witness is not permitted to testify to the law. That, in due course, I take it, will come from Your Honor.

"The Court: The motion is denied. I instruct the jury that the witness has only expressed his opinion and it is in no respect binding upon you, and certainly does not prove the facts that are at issue.

"Mr. Schachner: Your Honor does not wish to hear argument on that?

"The Court: No, sir."

In other Circuits, at least, it is clearly error to allow a witness to hazard an opinion on the law. *Lisansky* v. *United States*, 4 Cir., 31 F. 2d 846, 851; *cert. den.* 279 U. S. 873; *United States* v. *Caserta*, 3 Cir., 199 F. 2d 905, 909. To go further and to allow him to voice the hearsay opinion of his superiors turns topsy-turvy accepted rules of evidence, and leaves the defense without remedy.

The real prejudice to petitioners of course lies in the fact that the opinion, contrary to accepted law (*Commissioner* v. *Heininger,* 320 U. S. 467, 474; cf. *Edwin J. McEnaney,* 3 T. C. 552), accused the petitioners of a wholly new crime, namely, taking unlawful deductions on their corporate returns. Moreover, it tended to destroy the essence of their defense, which was that they showed their good faith by their willingness to pay corporate taxes.

IV.

Additional questions raised.

In addition to the foregoing this case raises other problems which grow out of the fact that receipt of commissions on business of the employer is illegal under state law.

(1) As appears more fully in the opinion below, since the commissions belong to the employer, the question arises whether *Commissioner* v. *Wilcox,* 327 U. S. 404, renders them non-taxable. The petitioners testified that one of the payors warned them that they should not report a loss of cash to the police and that if the employer found out about the payments, the employer would take the money from the petitioners (S. M. 1925, 1559).

Despite requests from the defense (S. M. 2284, 2289) the trial court did not submit this issue to the jury in terms of "claim of right," and the Court of Appeals analyzes it in terms of an issue of law rather than fact, and as such deems it controlled by *Rutkin* v. *United States,* 343 U. S. 130. Since this Court has three times refused *certiorari* on similar questions (see cases collected in the opinion below) we limit ourselves at this point to the observation that a good deal of confusion could be avoided if it were clear whether the issue is one of fact or of law.

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(2) It is, of course, well known that juries are prone to convict persons who are guilty of collateral misconduct, even if their guilt of income tax evasion should be doubtful. Insofar as collateral misconduct must of necessity be brought before a jury, it is an inevitable misfortune which a defendant must endure.

However, in this particular case the Government was permitted to prove that the petitioners unsuccessfully asked for commissions in a transaction which had no relation to actual receipt of income (S. M. 1137-8, 1136). The testimony obviously had no relevancy to the charge on which the petitioners were tried. On appeal the Government actually attempted to justify the admission of that testimony on the ground that it showed petitioners to be unethical aggressors. It would seem that a trial judge should not have discretion to permit the introduction of such testimony.

(3) The case also poses the question whether a judge in his charge, may consistently stress every inference of guilt, both overtly and by posing weighted questions, while neglecting inferences favorable to innocence (S. M. 2310, 2327).

Moreover, the charge, in at least three instances, misquotes the evidence on crucial points to the petitioners' detriment (S. M. 2324, but see 938, 984, 993; 2326, but see 1028; 2309, but see 1093-4, 2194-6). When this matter was called to the trial court's attention (S. M. 2352-6), there was no correction except that the jury's attention was called to defense counsel's version and the jury was told that its recollection governed (S. M. 2362-3, 2370, 2372). It would seem to be error for a trial judge to present the jury with an erroneous summary of the evidence, inasmuch as laymen are prone to accord great weight to the recollection of the judge.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUNO SCHACHNER
Counsel for Petitioner Koenke

FREDERICK H. BLOCK
Counsel for Petitioner Bruswitz

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APPENDIX

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 120—October Term, 1954.

(Argued November 10, 12, 1954 Decided January 12, 1955.)

Docket No. 23257

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN C. BRUSWITZ and EDWARD C. KOENKE,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,* and FRANK and MEDINA, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge.*

Defendants John C. Bruswitz and Edward C. Koenke appeal from their conviction under I. R. C. §145(b) for fraudulent failure to report as taxable income the proceeds of commercial bribes received in 1949, 1950, and 1951. Affirmed.

GEORGE H. BAILEY, Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., New

York City, on the brief), *for United States of America, plaintiff-appellee.*

BRUNO SCHACHNER, New York City, *for defendant-appellant Edward C. Koenke,* and

FREDERICK H. BLOCK, New York City, *for defendant-appellant John C. Bruswitz.*

CLARK, *Chief Judge*:

This is an appeal by John C. Bruswitz and Edward C. Koenke from their conviction of tax fraud under I. R. C. §145(b). Each was indicted on a separate three-count indictment charging willful attempts to evade federal income taxes by failure to report sums received in 1949, 1950 and 1951 as commercial bribes or kickbacks. A third indictment charged both with conspiracy to commit the same substantive offenses. The indictments were consolidated for trial to a jury which resulted in verdicts and judgments against them on all counts. Each received a sentence of fine and imprisonment on Count I of the substantive indictment against him, involving the 1949 taxes, and a concurrent prison sentence on the conspiracy indictment; while imposition of sentence was suspended on Counts II and III involving taxes for the years 1950 and 1951. On this appeal they concede, as they did at trial, that in the course of their employment as traffic managers and solicitors of bids for subsidiaries of Bethlehem Steel Company they used their positions to extract personal gains in the form of percentage "commissions" from companies interested in doing business with their employers. They deny, however, that the prosecution has shown or can show a fraudulent, intentional withholding of taxes. Hence they attack the court's charge in its basic holding of law, as well as in certain

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incidental details, together with various rulings during the trial.

The main argument here of the defendants concerns the taxability of bribes under I. R. C. §22(a). Relying on *C.I.R.* v. *Wilcox,* 327 U. S. 404, they urge that bribes closely resemble the proceeds of embezzlement there found nontaxable. It is difficult to perceive what, if anything, is left of the *Wilcox* holding after *Rutkin* v. *United States,* 343 U. S. 130, which ruled that moneys received by extortion were within §22(a). Certainly the whole approach of the later case, stressing actual possession and control, is diametrically opposed to the "claim of right" criterion of the earlier case. The reconciliation evolved by other circuits seems to be that even temporary dominion over illicit gains is sufficient to render them taxable in the hands of the holder thereof. *Briggs* v. *United States,* 4 Cir., 214 F. 2d 699, certiorari denied 75 S. Ct. 86; *Marienfeld* v. *United States,* 8 Cir., 214 F. 2d 632, certiorari denied 75 S. Ct. 87; *Kann* v. *C.I.R.,* 3 Cir., 210 F. 2d 247, certiorari denied 347 U. S. 967; *Rollinger* v. *United States,* 8 Cir., 208 F. 2d 109. Although eminently justified by the *Rutkin* holding, this formulation in effect does what the Supreme Court purported not to do; it overrules the *Wilcox* case. See Judge Johnsen's concurrence in *Marienfeld* v. *United States, supra,* 8 Cir., 214 F. 2d 632, 639-640; and Judge Kalodner's dissent in *Kann* v. *C.I.R., supra,* 3 Cir., 210 F. 2d 247, 253-255.

Nevertheless, the *Wilcox* case, limited to its facts, is distinguishable here. There a bookkeeper embezzled funds from his employer which he thereafter lost by gambling. The Supreme Court held that these funds were not income within §22(a) because of the embezzler's continuing obligation to restore these funds to his employer—a liability

which would have been subordinated to a government lien had the tax been found appropriate. The situation here is quite different. The N. Y. Penal Law distinguishes between embezzlement and commercial bribes, the former only requiring the actual taking or withholding of money or property from the true owner. Compare N. Y. Penal Law §§1290 and 439. That distinction is particularly relevant to the facts before us, since there is no indication that the kickbacks resulted in any loss to defendants' employers. While a presumption of such loss may be a sufficient basis on which to predicate a liability to the employers under state law, see *Donemar, Inc.* v. *Molloy*, 252 N. Y. 360, 169 N. E. 160, it is not sufficient to override the paramount interest of the government in assessing income taxes on the basis of beneficial enjoyment and control. See *National City Bank of New York* v. *Helvering*, 2 Cir., 98 F. 2d 93.

Defendants next argue that a significant part of the income from the bribes was not received by them individually in such a way as to render them taxable or subject to criminal prosecution therefor. In the year 1951—the year covered by Count III of the indictment, one of the counts upon which imposition of sentence was suspended—Bruswitz and Koenke, who previously had received their "commissions" personally and in cash, set up a variety of corporations to bill and receive payments for the services rendered. These new arrangements were necessitated by demands on the part of the payor corporations that they be allowed to regularize their accounting on these transactions. They contend that, since the corporations which they set up paid corporate income taxes, they themselves were not liable for personal taxes on the same amounts, except as they were filtered through as dividends. The prosecution characterized these corporations as mere conduits for the receipt of in-

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come earned by, and hence taxable to, appellants. *C.I.R.* v. *Sunnen,* 333 U. S. 591; *Helvering* v. *Eubank,* 311 U. S. 122; *Higgins* v. *Smith,* 308 U. S. 473; *Paymer* v. *C.I.R.,* 2 Cir., 150 F. 2d 334; *C.I.R.* v. *Smith,* 2 Cir., 136 F. 2d 556. There was sufficient evidence to support such a characterization to make the question one for the jury under appropriate instructions.

Defendants do contest the validity of the charge in reference to their criminal intent in setting up the corporations, arguing that the judge did not sufficiently stress that the payment of taxes by the corporations was evidence of lack of willful tax evasion. This argument is clearly an afterthought, since no coherent exception to the charge on this ground was taken at the time of the trial. Defendants now focus on this earlier statement in the charge when the judge was discussing whether or not income of their corporations was attributable to them personally. The judge then said: "If you find beyond a reasonable doubt that the corporations were organized and created solely and only as conduits for the receipt of moneys payable to the defendants * * *, then you may treat the moneys paid to the corporations as income to the individual defendants. *This is without regard as to whether or not the corporation paid the taxes on such income as it may have declared.*" (Italics supplied.) The emphasis on the irrelevance of corporate tax payments in deciding what payments constituted income, it is contended, carries over and corrupts the later discussion of intent. Counsel, however, failed to make this objection after delivery of the charge when the trial judge could readily have supplied the redistribution of emphasis which they now desire.

On the merits, it is to be said that the judge clearly indicated in the charge as given that he was discussing income

and intent separately, and that positive findings on both were required for a finding of guilt. It is not reasonably to be concluded that his entirely proper and complete charge on intent was nullified by his entirely proper and complete, though distinct, earlier charge on the substantive facts. In the instructions on intent the jury was told that defendants were entitled to acquittal if they had, in good faith, believed that their tax liability was being elsewhere discharged. The judge's failure to single out the particular piece of evidence on intent which the defendants stress was thus neither error nor prejudicial, regardless of the other evidence which he mentioned. See *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485, affirmed *Goldstein* v. *United States*, 316 U. S. 114.

It is to be noted further that, since they received no sentence on the count involving the 1951 taxes, defendants will achieve nothing of practical value unless they can secure reversal of the other convictions and in actual fact of the one conviction involving the 1949 tax. But defendants do claim that the alleged error would also vitiate this conviction because, according to their theory, it deprived them of their defense on willfulness that use of the corporate device was not for tax economies, but was for the admitted, though not here accused, impropriety of concealing their wrongdoing from their employers. Further, they say, evidence as to their intent in 1951 would have a bearing on their intent in 1949. But actually the judge's charge did cover this point, since he authorized the jury to "consider that these transactions clashed with the defendants' duties to their employers as showing that they had a motive to conceal the transactions wholly apart from the motive to deprive the government of revenue." This was in any event adequate to cover the point and to

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make unnecessary reversal for future exploration of it because of fear lest the jury may have overlooked this motive for concealment. Surely we should not assume such a lack of intelligence upon the part of the jurors as is needed to conclude that they must have disregarded both the orderly sequence and division of the judge's charge, as discussed above, and also the direction to evaluate the defendants' own proffered excuse.

None of the other assigned errors, largely concerned with the admissibility of evidence, merit more than passing comment. The challenged testimony of Kovner, Kelly, and Jones was admissible in the discretion of the trial judge, and was not unduly prejudicial to defendants. *United States* v. *Johnson,* 319 U. S. 503; *United States* v. *Cantor,* 2 Cir., Dec. 1, 1954; *United States* v. *Petrone,* 2 Cir., 185 F. 2d 334, certiorari denied 340 U. S. 931; *Wolin* v. *United States,* 4 Cir., 211 F. 2d 770, certiorari denied 75 S. Ct. 30. There was no evidence that the allegedly perjured testimony of Bouchard and Ranne was known as such to the prosecution. *Mooney* v. *Holohan,* 294 U. S. 103, 98 A. L. R. 406; *Tilghman* v. *Hunter,* 10 Cir., 167 F. 2d 661. Bouchard's testimony on the stand supplemented rather than contradicted the testimony he had given before the grand jury, and did not require the production of the grand jury minutes. The judge did not exceed the bounds of his discretion in limiting the cross-examination of some of the prosecution's witnesses. *Alford* v. *United States,* 282 U. S. 687; *District of Columbia* v. *Clawans,* 300 U. S. 617; *United States* v. *Rosenberg,* 2 Cir., 195 F. 2d 583, certiorari denied *Rosenberg* v. *United States,* 344 U. S. 838; *United States* v. *Quinn,* 2 Cir., 124 F. 2d 378.

Convictions affirmed.

FRANK, *Circuit Judge,* concurring:

I concur in the result and in all of the court's opinion except that I do not agree to what would be the effect upon convictions for previous years if we were to reverse the conviction for 1951 because of the charge in regard to intent. I am reluctant to concur on that point which I think we should not and need not discuss, because we have concluded there is no basis for reversing the conviction for 1951.

Extract from Government's Exhibit 32 (Specimen of questioned Document) and Defendants' Exhibits U, V and W.

(See Opposite) ☞

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